In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-621

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL., PETITIONERS

v.

THE TEXAS HIGHWAY DEPARTMENT, ET AL., AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

STATEMENT

The issue presented is whether Section 154 of the Federal-Aid Highway Act of 1973, Pub. L. 93-87, 87 Stat. 276 (see Pet. 3-4), which terminated "the contractual relationship between the Federal and State Governments * * * with respect to * * * the San Antonio North Expressway" is constitutional.

The San Antonio North Expressway was originally proposed as part of the national system of interstate highways. In 1970, the Secretary of Transportation approved construction of the two end segments of the expressway, but required the Texas Highway Department to study an alternate route for the middle segment which was to go

through parklands in San Antonio. Petitioners sued the State and the Federal Department of Transportation to enjoin construction of the approved segments, alleging, *inter alia*, that the Secretary's approval violated environmental protections provided by both the Department of Transportation Act (Section 4(f), 80 Stat. 933, as amended, 49 U.S.C. 1653(f)) and the National Environmental Policy Act of 1969 (Section 102, 83 Stat. 853, 42 U.S.C. 4332). The district court denied the injunction, but retained jurisdiction to review the Secretary's decision as to the middle segment. Pending appeal to the court of appeals, this Court stayed construction of the expressway, 400 U.S. 939, then vacated the stay, 400 U.S. 961, and denied a petition for a writ of certiorari, 400 U.S. 968.

Following this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, the Fifth Circuit reversed the district court's decision in this case, and held that the Secretary had failed to comply with the environmental safeguards of NEPA and the Department of Transportation Act before approving the "end segments" of the expressway. 446 F.2d 1013. The court viewed the proposed expressway as one project, and held that the environmental safeguards applied to the project in its entirety. The court rejected a proposal that the federal statutes would be inapplicable if the State built the road entirely with its own funds, holding that the State could not independently "circumvent" an Act of Congress by a mere bookkeeping shift. The court noted that the environmental priorities must be resolved "in the Halls of Congress, which is the proper place in our system of Government for priority decisions to be made." *Id.* at 1024. The case was remanded to the district court for further proceedings.

The State then withdrew its application for approval of the expressway and returned to the federal government all funds received from it for the project.[1] The district court, in accord with the decision of the court of appeals, nonetheless ordered compliance with the federal environmental statutes. Congress subsequently enacted the Federal-Aid Highway Act of 1973, Pub. L. 93-87, 87 Stat. 250-296. Section 154 of that Act (see Pet. 3-4) provides that notwithstanding any other provisions of federal law to the contrary, the "contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-Aid project."

In light of this Act of Congress, the district court dismissed petitioners' suit (Pet. App. 24a-30a). On appeal, the Fifth Circuit affirmed, holding, *inter alia*, that the effect of Section 154 was to exempt the construction of the expressway from the environmental requirements applicable to federal action (Pet. App. 1a-19a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of any other courts of appeals and does not warrant review by this Court.

1. Section 154 of the Federal-Aid Highway Act withdraws all federal support for the portion of highway in question and declares it no longer to be a federal project. Petitioners have apparently abandoned their argument that the Act, if valid, does not suffice to take the project out of the purview of the National Environmental Policy Act and the Department of Transportation Act.[2] They argue, how-

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[1] These funds were reapportioned among all the states, the District of Columbia, and the Commonwealth of Puerto Rico in accordance with the formula set forth in 23 U.S.C. 104.

[2] That the Highway Act does accomplish that purpose is fully established by the court of appeals (Pet. App. 6a-15a).

ever, that the Act is unconstitutional because it gives less environmental protection to people in the San Antonio area than in other areas of the country.

The Constitution, however, does not require geographical uniformity in federal expenditures for public works. And it is the expenditure, now withdrawn, which triggered the application of the environmental legislation in question.

Moreover, there is no constitutional principle prohibiting Congress from tailoring federal environmental legislation to meet specific situations. See, for example, *Friends of the Earth* v. *Armstrong*, 485 F.2d 1 (C.A. 10), certiorari denied *sub nom. Friends of the Earth* v. *Stamm*, 414 U.S. 1171.[3] And even where a constitutional provision, such as the Bankruptcy Clause (Art. I, Sec. 8, cl. 4) requires uniformity, the Court will permit non-uniform legislation where it can be supported by constitutional powers other than the bankruptcy power, or "to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, Nos. 74-165, 74-166, 74-167, and 74-168, decided December 16, 1974, slip op. 53.

As the court below held (Pet. App. 16a), Congress, having established the federal-aid highway program, can determine to which roads the program will apply. Congress chose to exclude the San Antonio expressway from the program and from federal environmental safeguards. This exclusion fully comports with the "rational basis" test of constitutionality established by this Court. *Rinaldi* v. *Yea-*

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[3] *Friends of the Earth* concerned special legislation first prohibiting then permitting waters of Lake Powell to enter Rainbow Bridge National Monument grounds. See also the cases listed at note 5, *infra*.

ger, 384 U.S. 305. Since the federal government will not be involved financially or in any other way with the proposed construction of the North Expressway, the federally-established environmental safeguards, which are a prerequisite to the granting of federal funds, need not apply.[4]

2. This case presents no conflict with decisions of other courts of appeals. Petitioners argue (Pet. 16-17) that the decision here conflicts with Judge Wright's opinion in *D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 434 F. 2d 436 (C.A. D.C.). But that opinion was not the opinion of the court. The decision in that case held that Section 23 of the Federal-Aid Highway Act of 1968 did not remove construction of the Three Sisters Bridge from the requirements of 23 U.S.C. 128(a) requiring public hearings on routes of proposed federally financed highways. Not only are the Acts in question different, but as petitioner concede (Pet. 16, n. 15), Judge Wright's constitutional objections to the special legislation were not accepted by the other two judges of the three-judge panel, who found that the statute was not intended to eliminate public hearings. The holding in *D.C. Federation* was thus not that Congress

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[4]We note that prior to passage of the 1973 Highway Act, the Senate Public Works Committee, in reporting favorably on Section 154, stated that it had "heard extensive evidence about the project, studied the proposed route and is satisfied that it would not involve significant damage to recreational areas." S. Rep. No. 93-61, 93d Cong., 1st Sess. 23. Moreover, Texas and some 20 other states have adopted state environmental policy requirements similar to those of the federal Act. The question of whether present Texas environmental laws apply to the expressway as a state project is now in litigation in the state courts. *Sierra Club, et al.* v. *Texas Highway Commission, et al.*, Third Judicial District, Travis County, Texas, No. 225, 356, final judgment of December 12, 1974 denying relief to plaintiffs, appeal noted.

could not constitutionally remove construction of a bridge from certain provisions of a federal statute otherwise applicable, but only that it had not done so. In the instant case, however, as the court below held, both the Act and its history conclusively show Congress' intent to exempt the expressway from the provisions of federal environmental laws (Pet. App. 8a-10a).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]We also note that after the decision in *D.C. Federation*, the same court suggested that statutory exemptions to federal environmental statutes can be made. *Committee for Nuclear Responsibility Inc.* v. *Seaborg*, 463 F. 2d 783 (agency reports recommending against a nuclear test must, under NEPA, be released "[*i*]*f* * * * *they are not subject to some statutory exemption* * * * ." 463 F. 2d at 788 (emphasis added)); *Calvert Cliffs' Coordinating Committee* v. *U.S. Atomic Energy Commission*, 449 F. 2d 1109 (NEPA must be complied with unless there is "a clear conflict of *statutory* authority," 449 F. 2d at 115 (emphasis in original)). Section 154 presents such a conflict in this case.